## APPENDIX

### Opinion of United States District Court

(Filed April 26, 1966)

The plaintiffs in this case are Negro children who are pupils in grades five, ten and eleven in the Public School System of Gould, Arkansas. This action was brought by their parents and next friends and is a class action seeking an injunction enjoining the Board of Education of the Gould School District from (1) requiring the minor plaintiffs and all others similarly situated to attend the all-Negro Field School for the 1965-66 school term, (2) providing public school facilities for Negro pupils in Gould, Arkansas, which are inferior to those provided for white pupils, (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, etc. to the predominantly white Gould Schools, (4) building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools, and from (5) otherwise operating a racially segregated school system.

The defendant school board claims that it is doing everything possible to correct the very things plaintiffs are complaining of and that no injunction is required or warranted, therefore the case should be dismissed.

The Gould School District encompasses about eighty square miles of agricultural land in Lincoln County in Southeast Arkansas. Almost 20,000 acres of this land is tax exempt because the Arkansas State Penitentiary is located within the district. It is a rural and agricultural

area. There are no significant industries within the district, and Gould, with a population of 1,210, is the district's only incorporated town. In the 1964-65 school year the district derived $56,530 from its millage levy on the assessed value of the real and personal property in the district and most of the rest of its budget of over $200,000 was received from various programs of the State and Federal Government. It is obvious from these facts and from other testimony given at the hearing of this case that this school district is a financially poor one.

The population of the district of about 3,000 consists of 1,800 Negroes and 1,200 white people. There are approximately 880 students in the system and 580 of these are Negro. Prior to 1965 the school board operated two school systems from grade one through twelve on a racially segregated basis. The Field Elementary School and the Field High School were attended by Negro children only. The Gould Elementary School and the Gould High School had only white students. In the spring of 1965 the defendant school board unanimously voted to accept a desegregation plan which provided for the integration of all twelve grades of the system in the 1965-66 school year in accordance with a "Freedom of Choice" plan.[1]

After the students and their parents had expressed their choice of schools it appeared that there would be overcrowding in the Gould Schools in grades five, ten, and eleven. The school authorities discussed the problem with the appropriate authorities of the Department of Health, Education and Welfare and it was agreed that it would be

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NOTE 1: The "Freedom of Choice" plan in this case is of the same type that the Court of Appeals for the Eighth Circuit indicated it would approve in Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965), therefore it is unnecessary to explain the details of the plan in this opinion.

better for the school to postpone the granting of the freedom of choice in these grades for one year. However, as many Negro children in these three grades as possible who chose the previously all-white school were accepted in that school on the basis of geographical proximity of their home to the school. The plan as amended was approved by the federal agency.

In other words, all students in the district were accepted in the school of their choice except in the fifth, tenth, and eleventh grades. In these grades some forty Negro pupils expressed a preference to attend the Gould Schools and twelve of them were accepted. The remaining students were assigned to the Field Schools, and it is this group that is represented by the plaintiffs in this case.

At the trial plaintiffs offered testimony concerning alleged discrimination within the district which they contend this Court should correct by use of its injunctive powers.

One of plaintiffs' contentions is that the Court should enjoin the defendant school board from maintaining a racially segregated school system. But the testimony discloses that the school board is no longer maintaining such a system. The desegregation plan which it has adopted and which has been approved by the Department of Health, Education and Welfare has brought about more than token integration even though it has been in operation only one year. There are 71 Negro students and 298 white students attending the previously all-white school and there will undoubtedly be more Negro students in this school next year. The Negro students are participating on the school athletic teams and taking part in several other extra-curricular activities at the school. Furthermore, in the school term beginning September 1966 it is

the plan of the district to honor the preference of all children in the three grades to which the Choice plan was only partially applicable this year.

Another contention of the plaintiffs is that the school board is discriminating against Negroes by paying Negro teachers salaries lower than those paid to white teachers. The testimony revealed that the base salary paid to Negro teachers is $3,870, while the base salary for white teachers is $4,050.00. The range of salaries for Negro teachers is from $3,870.00 to $4,500.00, and the range for white teachers is $4,050.00 to $5,580.00. The superintendent of the schools testified that he was well aware of the differences in salaries paid to the teachers of different races, and he said that the historical reason for this difference was simply the law of supply and demand. Because of the larger supply of Negro teachers he was able to hire them at lower salaries than those demanded by white teachers. He stated that five years ago, when he was first employed by the school system, the difference in the base salaries was $600. In the last five years the difference has been lowered to $180. The reason the salaries cannot be equalized before next year is purely a financial one. The budget for the 1965-66 school year is practically exhausted and there are no funds available for this or any other purpose.[2] In the course of his testimony, the superintendent assured the Court that the salaries for Negro and white teachers for the 1966-67 school year would be equal.

The primary complaint of the plaintiffs is that they are being discriminated against because the Field Schools to which they have been assigned are grossly inferior to the

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NOTE 2: The total received for all school purposes this year was $225,000. The budget expenditure is $221,000. This is a typical year. The surplus remaining from last year was $1,200.

Gould Public Schools. They show the inferiority of the Fields Schools by citing several examples. Some of these are: (1) the Field High School is a frame building erected in 1924 which is in a poor state of repair, with holes in the floor and cracks in the wall, while the Gould High School is located in a brick and concrete block building only two years old; (2) the Gould High School has an "A" rating from the Arkansas Department of Education, while the Field High School is unaccredited; (3) the restroom facilities at the Field High School are located in a separate building, causing students to walk outdoors to reach the restroom, while at the Gould High School the restroom facilities are located in the school building itself; (4) the Field High School is heated with upright gas heaters, while the Gould Schools are heated with central heat; (5) the science laboratory facilities at Field High School are inferior to those at Gould High School; (6) the library facilities at Field High are very poor, with few books and no full-time librarian, while the Gould School library contains almost 1,000 books and has a librarian; (7) there is no hot lunch program at the Field Schols, while the Gould Schools have an air-conditioned cafetorium; and, finally (8) courses in journalism and agriculture are not offered at the Field High School, while they are taught at the Gould High School.

The defendant admits that facilities at the Field High School are inferior to those at the Gould Schools, that the situation is a bad one, and that a new school building is needed. It claims that there are no funds available at the present time with which to build such a school and that the school district does not have sufficient borrowing power to secure enough money for such a project. To borrow that

much money the school district would need a new bond issue, but since the present millage is at 47 (the maximum allowable under State law),[3] new millage cannot be added to finance such a bond issue. However, one of the present outstanding bond issues will be paid off by January of 1967, and the nine mills used to finance that issue can be transferred to a new issue. The money obtained through this new bond issue has long been earmarked by the board for the construction of a modern facility to replace Field High School. Therefore, it appears that the defendant school board realizes the need for a new school building and is doing all that it is financially able to do toward filling this need.

On the other hand, the defendant does not admit the degree of inequality between the schools is as great as plaintiffs claim. They contend that although the Field High School building is in very poor condition and is inferior to the Gould High School building, the same is not true for the rest of the buildings in the Field School System. The evidence shows that in the last fifteen years, or at lease since 1954, over seventy-five per cent of all money available for construction has been spent on the Negro schools. In fact, the total building expenditures for the Negro schools since 1954 are in excess of $138,000. On the other hand, the only money spent on capital improvements at the Gould School was from proceeds of an insurance policy when the school building burned late in 1963. The new building was built entirely with the funds from this

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NOTE 3: Under Arkansas law a school district may not issue bonds in an amount in excess of 15% of the district's assessed valuation of property located within the district. Gould has reached that limit.

insurance policy.[4] The Field Elementary School is a modern brick and concrete block building built in 1954 with classrooms added as late as 1965. The gymnasium for the Field Elementary and High Schools is a modern concrete block building with excellent restroom, dressing room, and shower facilities, as well as a fine gymnasium and auditorium. The gymnasium at the Gould School is an old frame building in poor repair, with inadequate and unsightly dressing room and restroom facilities. The home economics buildings at both the schools are old buildings which the citizens of the school district have helped repair and decorate, and which are of approximately the same quality. Although it was never definitely established just what scientific laboratory facilities the Field High School has, it is evident from the testimony that they are inadequate and practically nonexistent. However, the laboratory facilities at the Gould High School would hardly be considered adequate or satisfactory. The laboratory is located in an old concrete block building that was once used as a barbeque house. For most of the experiments there is only enough equipment for the teacher to use at a demonstration desk and sink. According to the evidence, no building on either campus is heated by central heat, and in the last two years the same amount of money has been allocated to each of the libraries. The defendant admits that the Field Schools do not have a hot lunch program or an agriculture department but claims that federal aid is being sought, and the superintendent of schools assured the Court that both programs would be established

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NOTE 4: A Teacherage, consisting of two cottages for occupany by teachers, was constructed on the Field campus a year or two ago. This was financed locally, and the monthly payments to pay the loan come from rent paid by the teachers.

in the Field Schools by the end of this year. Defendant also states that the reason some courses such as journalism are taught in Gould School and not in Field School is that they are elective courses and are not taught unless there is a sufficient demand for them. Therefore the defendant claims that although conditions at the Field High School are poor, there is not a large degree of inequality between the two school systems.

During the course of the hearing on this matter, after the defendant had admitted the inferiority of the Field High School and had set forth its proposal for building a new facility, plaintiffs moved in open court to amend their petition for an injunction to include enjoining the defendant from building any new facilities to replace Field High School at any location other than on or adjacent to the grounds of the Gould Public Schools. This, it is believed, is the only real issue remaining in the case. The Court granted the motion, and evidence was heard on both sides of this question. The Court also asked counsel for briefs on the question of whether or not the Court could or should order the school district to build its proposed new facilities at any particular location.

It is plaintiff's contention that the building of a new high school at the site of the old Field High School or on the Field Elementary School grounds would promote and encourage segregation in the school system. Plaintiffs contend that if the new high school was built at one of these locations, only Negro pupils would request that they be assigned there. Plaintiffs also say that in fact this is the intention of the school board. They point out that at the hearing the superintendent of schools stated that probably only Negro children would select the new high school and plaintiff argues that this shows that it is

the school board's intention to create a "Negro high school" and not just another high school for the district. Plaintiffs argues that it is a breach of plaintiffs' constitutional rights to allow defendant school board to carry out a construction program which is designed to bring about or further segregation in the school system.

Plaintiffs also contend that it would be unsound for a school district in the financial condition of the Gould School District to maintain separate school facilities for Negro children. Such a plan would entail considerable duplication and would dilute the quality of education which could be offered to both white and Negro students by a school district of this size.

The defendant contends that the management or administration of the schools has been committed to local school officials and is not within the province of the Court and that selection of the location of a new school facility is an administrative or managerial decision which should be left to those officials whose duty is to determine what is best educationally and administratively for the school system. The defendant claims that there are several reasons why it is unsound to locate the new high school at the site insisted upon by plaintiffs and which support the board's selection of a site adjacent to the Field Elementary School. These facts are (1) that the school district already owns enough land at the Field Elementary School to accommodate the new high school building, (2) the district does not own sufficient land at the site of the Gould High School for this purpose, (3) additional land near the Gould High School is not for sale and would have to be acquired by condemnation at a high price since it is being subdivided into residential lots, (4) the new gymnasium (which has been referred to above) was

built on the grounds of the Field Elementary School to accommodate both elementary and high school students in anticipation of the location of the new high school on that campus, (5) that the location of the schools in opposite ends of town and on opposite sides of a heavily traveled U. S. highway is desirable for the safety of the children and for obtaining the educationally advantageous concept of "neighborhood schools."

The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case? These questions are of first instance before this Court, and in fact there is very little authority from any jurisdiction.

In the "landmark" civil rights cases concerning school integration the courts leave no doubt that segregation is and must be a thing of the past. They tell the courts that there can no longer be "Negro schools" and "White schools" and that the courts cannot permit a state to support "segregated schools through any arrangement, management, funds or property. . . ." *Cooper* v. *Aaron*, 358 U.S. 1. In a general way these cases give this and all district courts the authority to take what steps are necessary to insure that there is an end to segregation in our schools.

At the same time these cases also contain language which seems to recognize a limit to the courts' authorization to deal in school affairs. In *Brown* v. *Board of Education of Topeka*, 349 U.S. 294, the court said:

> "school authorities have the primary responsibility for elucidating, assessing, and solving these problems;

courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

In *Briggs* v. *Elliot,* 132 F.Supp. 776, 777 (E.D. S.Car. 1955), a three-judge district court interpreting *Brown* said,

"Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the state."

And this Court in *Aaron* v. *Cooper,* 164 F.Supp. 325, 334 (1959) stated:

"It is not the duty or function of the Federal Court to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities."

These cases make it apparent that there is a limit to the court's authority to deal in school matters, although they do not say what that limit is.

In *Board of Public Instruction of Duval County, Fla.* v. *Braxton,* 326 F.2d 616 (1964), the Court of Appeals for the Fifth Circuit approved an injunction issued by Judge Simpson of the District Court for the Middle District of Florida in which the school authorities were enjoined from operating a compulsory biracial school system, maintaining dual attendance areas, assigning pupils and teachers on the basis of color, and from

"Approving budgets, making available funds, approving employment contracts and construction programs,

> and approving policies, curricula and programs designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

Although that injunction does not go as far as plaintiffs have asked for in this case, it does go further into the realm of school administration than any other court has gone. Perhaps some of the factors that the case dealt with should be pointed out in that they may limit the scope of the decision.

In that case the court was dealing with a school system that, some eight years after the second *Brown* decision, had done nothing toward bringing an end to segregation. In fact, the board was still maintaining and planning to continue to maintain separate systems for colored and white children with dual attendance areas. The court, of course, was trying to enjoin *all* this type action. Therefore it did enjoin all the policies of the board including its future construction policies which were "designed to perpetuate, maintain or support a school system operated on a racially segregated basis."

In June of 1965 this Court in *Yarbrough* v. *Hulbert-West Memphis School Dist. No. 4*, 243 F. Supp. 65, 71, said:

> ". . . the basic responsibility and authority for operating the schools in a constitutional manner rest upon school boards and school authorities rather than the courts. The question is not what the court would do if it were operating the schools, but whether the defendants are proceeding in a permissible manner from a constitutional standpoint."

This still seems to be the better or most well reasoned role for the court. It should be an ameliorative or corrective

body rather than an initiating or policy-making one. Once the school board has made a decision to take a certain action in the administration of the schools, then it becomes the Court's duty to determine whether or not this action is constitutional.

However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action.

Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated.

Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located.

## CONCLUSION

Practically all of the questions or problems in this case stem from one major source—the school district has a serious lack of funds. The main problem, of course, is the inferiority of the Field High School. However, if the Court ordered the school board to build a new facility tomorrow the board would be powerless to act. It simply does not have the money to do so. It is obviously not the purpose of an injunction to order someone to do something he is already doing or something which is impossible for him to perform. Therefore, this Court can see no reason for the requested injunction to be issued. The petition will be denied and the case dismissed.

Dated: April 26, 1966.

GORDON E. YOUNG
*United States District Judge*

## Order of Dismissal

(Filed April 26, 1966)

In accordance with memorandum opinion filed this date, the complaint is dismissed.

Dated: April 26, 1966.

/s/ GORDON E. YOUNG
*United States District Judge*

## Opinion of United States Court of Appeals For the Eighth Circuit

[Filed August 9, 1967.]

Before VOGEL, Chief Judge, VAN OOSTERHOUT and GIBSON, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

This timely appeal is taken from final judgment dismissing a class action brought by plaintiffs as parents and next friends of sixteen minor Negro students attending grades five, ten and eleven of the defendants' district Negro school against the Board of Education of the Gould School District pursuant to 28 U.S.C.A. § 1343(3) and 42 U.S.C.A. § 1983, seeking injunctive relief. The prayer of the original complaint is to enjoin the defendant Board from:

> "(1) requiring minor plaintiffs and all other similarly situated to attend the all-Negro Field School for the 1965-66 School Term;
>
> (2) providing public school facilities for Negro pupils in Gould, Arkansas which are inferior to those provided for white pupils;
>
> (3) expending any funds for operation or improvement of the predominantly white Gould Public Schools until and unless the Field School is made substantially equal in facilities, equipment, curriculum, advantages, opportunities, etc. to the predominantly white Gould schools; and

(4) otherwise operating a racially segregated school system."

At the close of all of the evidence, plaintiffs amended their complaint by striking item (3) above set out and substituting in lieu thereof:

> "the prayer to have any future high school facilities in the Gould School System constructed on or near the premises of the present Gould high school, which is now attended predominantly by white pupils, . . ."

Upon appeal, plaintiffs again altered their position and urged that the Board be restrained from using the new building construction as a replacement for the Field High School and that instead, the building be converted into a unit of a completely integrated grade school. The issue last stated is raised for the first time upon appeal and was not presented to the trial court and no opportunity was afforded the parties to offer evidence on the feasibility of such a plan, nor was the trial court given any opportunity to pass thereon. It is fundamental that issues not presented to or considered by the trial court cannot be considered upon appeal.

The trial court, in our view, states the issues properly raised by this appeal as follows:

> "The question before the Court is actually two pronged. First, is this Court authorized to tell the school board where to build or not to build a new school building, and second, should the Court do so under the circumstances in this case?"

The trial court on the first issue recognized that under appropriate circumstances a constitutionally discriminatory construction program could be enjoined, stating:

> "However, this Court is not prepared to state that there might not be circumstances under which the Court would be justified in taking action such as that the plaintiff is asking for in this case. Assuming without deciding that this is an area of school policy-making which the Court could enter to protect the civil rights of the school district's citizens, this Court does not feel that the circumstances of this case merit such action."

Our recent decision in *Kelley* v. *Altheimer*, 8 Cir., . . . F.2d . . . (April 12, 1967), recognizes that a court may enjoin a construction program which is designed to perpetuate segregation. The supporting facts in *Altheimer* are far stronger than those in our present case. We recognized in *Altheimer* that injunctive relief against construction could not be effective after a building is constructed. Such appears to be the situation here.[1]

The trial court as a basis for its refusal to exercise its equitable powers to grant the injunction requested states:

> "Here the school board has begun a desegregation program for all twelve grades without having been ordered to do so by a court. The delay in the program for the three grades involved in this case is

[1] Attached to plaintiffs' brief is an affidavit of their attorney dated April 28, 1967 which states that the building in controversy is under construction and from which it would appear that considerable progress had been made upon such construction.

temporary and future plans call for complete integration. The fact that the Negro children who are attending the previously all-white schools are participating in the school's curricular and extra-curricular activities seems to indicate that this plan is more than a pretense or sham to meet the minimum requirements of the law.

"The availability of campus area in one place and not the other, the lack of funds to procure more land, and the necessity of locating the new high school near the existing gymnasium designed to accommodate the high school students are all valid reasons for the administration's decision as to the location of the new high school. There is no reason to assume that only Negro students will attend the new high school. In fact, it is a virtual certainty with the progress of integration, building space limitations alone will insure that the new school will be integrated. Certainly these reasons, coupled with the school board's recent initiative toward integrating the schools, do not indicate that the board's plans are solely motivated by a desire to perpetuate or maintain or support segregation in the school system. Therefore, the Court will not usurp the normal managerial prerogative of the school board to the extent of determining where the new building will be located."

We note that the Field High School which was being replaced is the oldest building in the school system. The bulk of the evidence in this case is directed at its many deficiencies and dilapidated condition. The Negro segment of the community had for years been insisting that

a replacement of such building be made and continued to assert such position throughout the trial and at least until the amendment made at the close of all of the evidence hereinabove set out. Reference is made in plaintiffs' testimony to an alleged prior action which purported to require the Board to give priority to the upgrading of the Field High School and the Board's commitment so to do. The evidence discloses that the district is weak financially and that prior construction was largely prevented by statutory limitations upon bonded indebtedness. It would appear that such obstacle would be cleared up by the completion of payments on prior bonded indebtedness by 1967. There is absolutely nothing in the record to indicate the nature of the plans for the new high school building under construction on the Field elementary school grounds. The evidence does disclose that a gymnasium and certain other facilities on such ground already in existence had been used and would continue to be used by students in the Field High School. Moreover, there is no showing that the Field facilities with the new construction added could not be converted at a reasonable cost into a completely integrated grade school or into a completely integrated high school when the appropriate time for such course arrives. We note that the building now occupied by the predominantly white Gould grade school had originally been built to house the Gould High School.

As pointed out by the trial court, the defendant Board had voluntarily adopted a desegregation plan for the schools which it operates, the plan to be in effect in September 1965. Such plan went considerably beyond the minimum requirements of the Department of Health, Edu-

cation and Welfare (H.E.W.), providing for immediate unrestricted freedom of choice of school attendance on the part of all students, and provision was also made for faculty desegregation. The desegregation plan is similar to a plan we indicated would be approved in *Kemp* v. *Beasley*, 8 Cir., 352 F.2d 14.

Subsequently, when the students exercised the freedom of choice provided for by the plan, it developed that grades five, ten and eleven would be seriously overcrowded which led to an amendment making the freedom of choice inoperative for the 1965-66 school year with respect to grades five, ten and eleven but fully effective thereafter. The plan as amended was approved by H.E.W. As stated in *Kemp* v. *Beasley*, supra, final responsibility for determining the constitutionality of desegregation plans rests with the court but H.E.W. guidelines are entitled to considerable weight.

In *Clark* v. *Board of Education of Little Rock Sch. Dist.*, 8 Cir., 374 F.2d 569, we approved a freedom of choice plan similar to that adopted by the Board here. We stated:

> "[W]hen a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. . . .
>
> Therefore, if in fact all the students wishing to transfer were fully accommodated, the Constitution would unquestionably be satisfied, and apparently under these circumstances petitioners would have little objection to the plan's operation. . . ." 374 F.2d 569, 571-72.

We recognized in *Clark* that a plan appropriate on its face could be unconstitutionally administered and observed that in case of such a development, the District Court upon appropriate application could do what is necessary to bring the plan up to constitutional standards.

Prior to 1965, the defendant District had operated an all-Negro school known as the Field school and an all-white school known as the Gould school on a segregated basis. The district is a predominantly agricultural district with little industry. The population is approximately 3,000 of which 60% are Negro. There are about 880 students in the system of which 580 are Negro.

Under the freedom of choice plan adopted, all students expressed their attendance preference. Seventy-one Negroes who expressed a preference for the Gould School were accepted for attendance at that school. All preferences except those for overcrowded grades five, ten and eleven were fully respected. Twelve of the forty Negro students applying were accepted in grades five, ten and eleven. Those who were accommodated at Gould lived the greatest distance from Field. Under the plan all preferences are to be honored commencing with the 1966-67 school year.

The evidence shows that the defendant Board has taken substantial steps to narrow the gap between the salaries paid to white and Negro teachers and that any discrepancy in this respect will be completely eliminated by the 1966-67 school year. The superintendent as a witness also stated that no teachers would be discharged as a result of the integration. It also appears that the transportation of pupils has been integrated.

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The enrollment at the Gould school in 1965-66 consisted of 71 Negro students and 298 white students. Thus substantial progress toward integration has been made in the first year of the plan's operation. With the restricted grades open for freedom of choice and upon the basis of the favorable acceptance of the Negro students at the Gould school, it is reasonable to anticipate that integration will rapidly progress as predicted by the trial court.

The complaint charges coercion has been used against integration. The Chief of Police of Gould was named as a defendant on this charge. The case was voluntarily dismissed by the plaintiffs against him. There is no substantial evidence that any coercion was exercised to deter Negro students from electing to attend the white school. The record fairly shows that the integration plan has operated smoothly and that the Negro students have been encouraged to elect the white school.[2]

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[2] The testimony of the president of the school board includes the following:

"We have had wonderful cooperation out of the white people and the colored people. I'd say that we have got ninety-five percent of the cooperation out of both sides. And the Board as a whole—if I might elaborate just a little—has gone out of our way in going to athletics—not just the Board, but all the people, to go to our athletic program, or any social functions and to discourage any violence or any nagging, or anything of that nature, not only with the white patrons, but the colored patrons, we've had wonderful cooperation. We've got a small minority that's not interested in our schools or our people or our economy or our welfare that don't even have kids. We haven't had any trouble out of people that's got kids that's going to school—colored or white. We've had wonderful cooperation out of them.

. . . .

"Q. Do you have any knowledge of any such coercion or undue influence attempted to be exercised with respect to the students

The trial judge by reason of his presence at all stages of the trial has the feel of the case. The court's findings are based upon substantial evidence and are not clearly erroneous. Moreover, the trial court has a large discretion in determining whether an injunction should be granted. See 43 C.J.S.2d Injunctions §§ 14, 15, and cases there cited.

Plaintiffs have failed to demonstrate that the trial court abused its discretion in denying the injunction here sought.

Plaintiffs alternately upon this appeal ask us to issue a comprehensive decree governing the desegregation process similar to that in *Kelley* v. *Altheimer*, supra. The record in this case does not warrant such relief. Unlike the Altheimer situation, no attack has been made in the pleadings on the desegregation plan adopted by the Board. Additionally, we find no substantial evidence to support a finding that the Board was not proceeding to carry out the plan in good faith.

Primary responsibility for the operation of the public schools rests in the school board. Courts are not equipped to solve the everyday problems of school operation. The court's interference with the Board's operation of its school is justified only upon a showing that the Board in

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making their choices, that are allocated under this plan, by any employees or representatives of the Gould School District?

A. None whatever, by no member of the faculty, no member of the School Board, or no farmers. In fact we have encouraged colored people to send their kids up to the white school. To the contrary, they have failed and refused—people that we thought we could talk with if something come up, that we could adjust the situation. There hasn't been any economic pressure put on. Almost every member of this Board has got colored people living on their farm that have colored children in the white schools."

its operation of its school is depriving pupils of rights guaranteed by the federal constitution.

In *Brown* v. *Board of Education of Topeka,* 349 U.S. 294, 299, the Court states:

> "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

In our present case, no issue on the adequacy of the plan adopted by the Board or its implementation was raised in the District Court. Issues not fairly raised in the District Court cannot ordinarily be considered upon appeal. *Hormel* v. *Helvering,* 312 U.S. 552, 556; *Duignan* v. *United States,* 274 U.S. 195, 200; *Smith* v. *American Guild of Variety Artists,* 8 Cir., 368 F.2d 511, 514.

The judgment is affirmed.[3]

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[3] The evidence in this case was taken on November 24, 1965. Due to disability of the reporter, the preparation of the transcript of testimony was delayed and this has delayed the appeal. Since the hearing in the trial court, the 1966-67 school year has been completed and the 1967-68 year is about to commence. Our decision is based upon the record before us. If subsequent evidence should prove that the defendant Board is not fairly administering its integration plan, resort to the equitable powers of the District Court is open to any aggrieved party.

**Judgment**

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

September Term, 1966

No. 18,527

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Arthur Lee Raney, by his mother and next friend, Mrs. Roxie Raney; Bobby Cox and Annette Cox, by their grandmother and next friend Mrs. Carrie Dilworth; Charles Washington, by his mother and next friend, Mrs. Vertis Frazier; Dennis James Bailey, by his mother and next friend, Mrs. Olens Bailey; Robert Hall, by his mother and next friend, Nonie Mae George; Wyvonne Dale, by her mother and next friend, Laverne Dale; Earnestine Dale, by her father and next friend, E. W. Dale; Irma Jean Clark, by her grandmother and next friend, Mrs. Mattie Harper; Linda Wright, by her grandmother and next friend, Mrs. Blanche Newman; Jake Taylor, Jr., and Linda Austin, by their mother and next friend, Mrs. Beatrice Austin; Willie Lee Jones and Stella Harper, by their parents and next friends, Mr. and Mrs. Rice Harper; Bobbye Carolyn Hadden, by her mother and next friend Mrs. Norma Jean Hadden; Jesteen Jasper, by her father and next friend, Jim Jasper,

*Appellants,*

vs.

Board of Education of the Gould School District.

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*Judgment*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

August 9th, 1967.

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**Order Denying Petition for Rehearing**

(Filed September 18, 1967)

Appellants' Petition for Rehearing en banc or by the Panel filed in this cause having been considered, It is now here Ordered by this Court that the same be, and it is hereby, denied.